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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ORACIO RAMIREZ ADAME, Defendant and Appellant.	F070497 (Super. Ct. No. VCF268422A) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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Oracio Ramirez Adame (defendant) stands convicted, following a jury trial, of murder committed for the benefit of or in association with a criminal street gang, during the commission of which a principal personally and intentionally discharged a firearm, proximately causing great bodily injury or death (Pen. Code,[1] §§ 186.22, subd. (b), 187, subd. (a), 12022.53, subds. (d) & (e)(1); count 1), and active participation in a criminal street gang (§ 186.22, subd. (a); count 2). In addition, he pled nolo contendere to second degree robbery committed for the benefit of or in association with a criminal street gang, during the commission of which a principal personally used a firearm (§§ 186.22, subd. (b)(1)(C), 211, 12022.53, subds. (b) & (e)(1); count 3), in return for which an additional count of active participation in a criminal street gang (§ 186.22, subd. (a); count 4) was dismissed. He was sentenced to prison for a total unstayed term of 13 years plus 50 years to life, and ordered to pay restitution and various fees, fines, and assessments. We now hold: (1) The jury was not improperly permitted to convict defendant of first degree premeditated murder, as an aider and abettor, under the natural and probable consequences doctrine; and (2) The abstracts of judgment must be corrected to clarify that the fines and other monetary orders were imposed only once. We order correction of that and other clerical errors (both in the abstracts of judgment and the sentencing minutes) and affirm the judgment.

FACTS[2]

On the morning of May 6, 2012, Joseph Contreras, Huber Barron, and brothers Rafael Mares and Guadalupe Mares were visiting the graves of friends and family at

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1 All statutory references are to the Penal Code unless otherwise stated.

2 In light of the issues raised on appeal, we dispense with a detailed statement of the facts.

Virtually all the civilian witnesses clearly were reluctant to testify at trial. Prior inconsistent statements they gave to law enforcement shortly after the shooting were admitted into evidence and form the basis for much of our summary.

Smith Mountain Cemetery in Dinuba, when defendant and several other people pulled up in a blue Impala. Defendant was in the backseat, directly behind the driver. Defendant, who was a Sureño, and Barron, who associated with Norteños, had had problems for years and would "mad dog" — stare in a threatening manner at — each other.

Defendant and his companions got out of the Impala, and one of them challenged Barron's group by aggressively asking, "What's up?" They walked toward Barron's group as if to surround them. Defendant appeared angry, like he wanted to fight. Guadalupe Mares saw one of defendant's group lift his shirt and reach for something near his right waistband. Sensing trouble, those in Barron's group started to run. While running, Contreras and the Mares brothers heard three to five shots that sounded the same, fired closely together. Contreras turned back around, because Barron screamed his name. Contreras ran back to help him. After the shooting, defendant's group got back in the Impala and fled the scene. Jeremiah Valenzuela, a friend of those in Barron's group who was also visiting the cemetery that day, saw the driver of the Impala with a handgun out the window of the car, pointing in Barron's direction. The passenger window where defendant was seated was also down.[3]

When Guadalupe Mares saw Barron a few minutes later, Barron was clutching his bloody chest and said he had been shot. Guadalupe Mares and the others got Barron into the car and started to drive him to the hospital. On the way, Contreras called 911 and arranged to meet police and an ambulance.

Barron suffered three gunshot wounds, one to the center front of his chest, another to two left ribs, and a third to his left arm. He died as a result of massive blood loss caused by the gunshot wound to the chest, which pierced his heart.

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[3] Valenzuela initially was several feet from the Impala. He heard whispering and a sound like a gun being racked. He heard gunshots, and saw Barron fall, shortly after.

When defendant was first contacted by law enforcement in this case, he admitted associating with Sureño gangs and having the moniker "Casper." He acknowledged knowing Barron, and that Barron associated with Northerners, the rivals of Sureños.[4] He also admitted being at Christian Mancilla's house in Orange Cove on the day of the shooting, and knowing Nicholas Salazar, who drove a blue Impala.[5]

Defendant presented an alibi defense through family members.

DISCUSSION

I. THE JURY INSTRUCTIONS DID NOT PERMIT DEFENDANT, AN AIDER AND ABETTOR, TO BE CONVICTED OF FIRST DEGREE MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE.

Defendant's jury was instructed, with respect to count 1, on first and second degree murder (including express and implied malice), and premeditation and deliberation. The People did not assert defendant was the actual shooter. Accordingly, jurors were also instructed on directly aiding and abetting murder, aiding and abetting battery with murder as a natural and probable consequence, and conspiracy to commit murder.[6]

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[4] Detective Sanchez, the People's gang expert, opined that at the time of the shooting, defendant was an active participant in the Big Time Locos (BTL) subset of the Sureño criminal street gang, while those in Barron's group all were active participants in the Norteño gang.

[5] According to Christina Deleon, "Casper from Orosi, BTL" left the Orange Cove house in the blue car, with Salazar and Mancilla, on the morning of the shooting. Deleon said Salazar and Mancilla were giving "Casper" a ride home.

[6] Although defendant was not charged with conspiracy, the court instructed at one point that defendant was so charged in count 1. This misstatement, and the court's instruction at another point that in order to prove defendant was guilty of willful, deliberate, and premeditated murder as charged in count 1, the People had to prove defendant conspired to commit murder, were needlessly confusing. Nevertheless, murder committed in the course of conspiracy to commit murder necessarily would have been premeditated on the facts of this case (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356, fn. 4; see *People v. Maciel* (2013) 57 Cal.4th 482, 515; *People v. Cortez* (1998) 18

In *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), the California Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (*Id.* at pp. 158-159.) Defendant now contends the trial court's instructions ran afoul of this holding, requiring reversal of his conviction of first degree murder.

In *Chiu*, the defendant was found guilty of first degree premeditated murder on the theory that either he directly aided and abetted the murder, or he aided and abetted the target offense of assault or disturbing the peace, the natural and probable consequence of which was murder. (*Chiu, supra,* 59 Cal.4th at p. 158.) With respect to the natural and probable consequences theory, the trial court instructed that the jury could find the defendant guilty of first degree murder if it determined murder was a natural and probable consequence of either target offense aided and abetted, and in committing the murder, the *perpetrator* acted willfully, deliberately, and with premeditation. (*Ibid.*)

The California Supreme Court found the instructions erroneous. It reasoned that a primary rationale for punishing aiders and abettors who aid or encourage the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing, is served by holding such aiders and abettors culpable for the actual perpetrator's commission of the nontarget offense of second degree murder. (*Chiu, supra,* 59 Cal.4th at p. 165.) The mental state required for first degree premeditated murder, however, "is uniquely subjective and personal." (*Id.* at p. 166.) The court found "the connection between the defendant's culpability and the perpetrator's premeditative state . . . too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine," although aiders and abettors remain subject to

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Cal.4th 1223, 1231-1232; cf. *In re E.R.* (2010) 189 Cal.App.4th 466, 470), and defendant does not contend he was harmed by the court's instructions in this regard.

conviction of first degree premeditated murder based on direct aiding and abetting principles. (*Ibid*.) "Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.]" (*Id*. at p. 167.) An aider and abettor who knowingly assists a murder "[can] be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent." (*Ibid*.)

We examine the instructions given in defendant's case against *Chiu*'s holding. In so doing, we apply the independent or de novo standard of review in assessing whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) " 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) " 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments . . . .' [Citation.] ' " 'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' " ' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

It is apparent from the jury instruction conference that the court and counsel were aware of *Chiu*. The court ultimately instructed the jury in part: "To prove the defendant is guilty of murder, the People must prove that: One, the defendant is guilty of battery; two, during the commission of battery, a coparticipant in that battery committed murder; and three, under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable

consequence of the commission of the battery." After instructing on express and implied malice, the trial court continued: "The defendant is guilty of first degree murder if the People have proved that *he* acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if *he* intended to kill. The defendant acted deliberately if *he* carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. The defendant acted with premeditation if *he* decided to kill before completing the act that caused death." (Italics added.)

The court proceeded to explain how jurors should handle the multiple possible verdict forms for count 1. The court then told jurors: "The defendant is charged with battery. This offense is the target offense for the purposes of the natural and probable consequence doctrine *as it relates to second degree murder*." (Italics added.)

The attorneys gave their summations after the jury was instructed. In pertinent part, the prosecutor stated:

> "There are two forms of murder in our state. Second diagnose [*sic*] murder and first-degree murder. We're going to talk about both. We're going to start with second-degree murder because it's the lesser and move up to the greater as we discuss it.
>
> "So in this case for second-degree murder, we're talking at the bear [*sic*] minimum of what we know in this case *using what's called the natural and probable consequences doctrine*. [¶] . . . [¶]
>
> "Natural and probable consequences in general that means it is one that a reasonable person would know is likely to happen if nothing unusual intervenes. And it's done from a reasonable person's standard.
>
> "In other words, when you look at it from the outside, would a reasonable person think going to the cemetery with other gang members, confronting rivals with the intent to go beat them up, that someone is going to bring a gun or some other means and that it could end up killing someone. That's what natural and probable consequences is about. [¶] . . . [¶]
>
> "Battery is what's called potentially one of the target crimes in this case. If you find they went there with the intent to commit a battery — in

other words a gang assault — to take advantage of a scenario and use it to beat up and further their own agenda. But as a result of committing that battery, if it's something that a reasonable person would know is likely to happen if nothing unusual intervened . . . . [¶] . . . [¶]

"The gang world, they take advantage of coming upon rival gang members or people they believe to be rivals or just against their cause. . . . They will attack them. And it's very likely and foreseeable that one of those people doing the attack is going to bring a knife, a gun, some ability, even their feet to stomp somebody to death. That is a natural and probable consequence.

"But, ladies and gentlemen, *that's not all we have in this case*. So we know *at the very least second-degree murder has been proven*.

"So what's the difference between second-degree and first-degree. *Well, to show first-degree murder so when the defendant was aiding-and-abetting in the death of Huber Barron, he acted willfully. He himself intended to kill. He himself carefully weighed the considerations for and against the choice and knowing those consequences decided to kill*. That's deliberately. *Premeditation when the defendant decided to kill before committing, he decided to kill before committing the act that caused death*. . . . [¶] . . . [¶]

"*So looking at what this defendant did. What do we have that shows he, himself, . . . had that own desire to kill Huber Barron*." (Italics added.)

Assuming the trial court's instructions, standing alone, were ambiguous, the prosecutor made it very clear a verdict of first degree premeditated murder could only be predicated on defendant's own mental state, and that the natural and probable consequences doctrine applied to second, not first, degree murder. Under the circumstances, there is no reasonable likelihood jurors understood the instructions as defendant now contends. (See, e.g., *People v. Chun* (2009) 45 Cal.4th 1172, 1203; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1032-1033, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)[7]

[7] The fact jurors asked, during deliberations, for "the simplest explanation & distinction" between first and second degree murder, in response to which the trial court reread CALCRIM No. 521 concerning premeditation and deliberation, and then referred jurors to the other instructions it had given on murder, aiding and abetting, and

II. DEFENDANT IS ENTITLED TO HAVE THE ABSTRACTS OF JUDGMENT CORRECTED TO CLARIFY THAT THE FINES AND OTHER MONETARY ORDERS WERE IMPOSED ONLY ONCE.

After sentencing defendant to an indeterminate term on count 1 and a determinate term on counts 2 and 3, the trial court ordered him to pay a $10,000 restitution fine (§ 1202.4), a $10,000 parole revocation restitution fine that was suspended (§ 1202.45), a $10 robbery fine (§ 1202.5), a court operations assessment totaling $120 (§ 1465.8), and a criminal conviction assessment totaling $90 (Gov. Code, § 70373). In addition, the court ordered defendant to pay restitution to the Victim Compensation Government Claims Board in the amount of $5,000 for funeral expenses, and it ordered that restitution remain open with respect to Barron's parents and also with respect to N.J., the victim of the robbery count.[8] The sentencing minutes accurately reflect that the court imposed the monetary orders once as to the entire sentence.[9]

The trial court correctly caused to be prepared an abstract of judgment for the indeterminate term (form CR-292) and a separate abstract of judgment for the determinate term (form CR-290). However, the monetary orders were set out in full on

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conspiracy, does not alter our conclusion. Fairly read, the jury's question does not suggest jurors were confused concerning when the natural and probable consequences doctrine could be utilized. Moreover, although the trial court included CALCRIM No. 403, which addressed that doctrine, in the list of instructions to which it referred jurors, the instruction it reread to the jury expressly stated the People had to prove *defendant* acted willfully, deliberately, and with premeditation.

[8] The court ordered that a restitution hearing be held on January 13, 2015. The record on appeal does not contain the results of that hearing.

[9] A single restitution fine is imposed per case, "taking into account all the offenses in the proceeding . . . ." (*People v. Holmes* (2007) 153 Cal.App.4th 539, 547; see *People v. Enos* (2005) 128 Cal.App.4th 1046, 1049.) The section 1465.8 and Government Code section 70373 assessments are imposed per count, but generally stated as aggregate amounts. (See, e.g., *People v. Cortez* (2010) 189 Cal.App.4th 1436, 1438; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 863.) Neither party suggests the trial court erred in the manner in which it imposed any of the monetary orders in this case, or with respect to the amounts imposed.

both abstracts. Defendant now says the monetary orders must be stricken, as clerical errors, from the determinate term abstract of judgment. The Attorney General implicitly concedes the monetary orders could not be imposed, in full, with respect to both the determinate and indeterminate terms, but claims there was no error and suggests the professionals who deal with abstracts of judgment will not be confused. In any event, she says, if defendant is required to pay more than ordered, he can call the error to the authorities' attention and it can be corrected. We decline to place quite so much responsibility on, or faith in, defendant and the prison authorities.

"[T]he abstract of judgment is not itself the judgment of conviction, and cannot prevail over the court's oral pronouncement of judgment to the extent the two conflict. [Citations.] However, the abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence. It may serve as the order committing the defendant to prison [citation], and is ' "the process and authority for carrying the judgment and sentence into effect." [Citations.]' [Citation.] As such, 'the Legislature intended [it] to [accurately] summarize the judgment.' [Citation.] When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability. [Citations.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) Thus, as the California Supreme Court has recognized, "[i]t is . . . important that courts correct errors and omissions in abstracts of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) This is so even when such errors or omissions only involve fines, as fines are part of the judgment, and all fees and fines must be set forth in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1080.)

Here, the abstracts of judgment give the incorrect impression the various monetary orders were fully imposed twice — once with respect to the determinate term, and once

with respect to the indeterminate term.[10] Although box 7 on the abstract of judgment for the indeterminate term is checked, indicating an additional determinate term was imposed and directing the reader to form CR-290, the corresponding box on the abstract of judgment for the determinate term, which directs the reader to form CR-292, is blank. Thus, there is no guarantee the professionals who deal with abstracts of judgment would not be confused, or that they would have any incentive to believe defendant if he attempted to call the error to their attention.

Although the abstracts of judgment in this case correctly reflect the trial court's monetary orders (except with respect to that imposed pursuant to § 1202.5) and so are not, strictly speaking, incorrect, they give the erroneous impression the fees, fines, and assessments were imposed twice. This ambiguity constitutes a clerical error that we will order corrected to reflect the actual judgment of the trial court. (See *People v. Mitchell*, *supra*, 26 Cal.4th at p. 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to (1) cause to be prepared an amended indeterminate term abstract of judgment (form CR-292) that reflects, in addition to the monetary orders already set out on page two of that form, imposition of a $10 fine pursuant to Penal Code section 1202.5 and, on page one of that form, shows an enhancement of 25 years to life imposed pursuant to Penal Code section 12022.53, subdivisions (d) and (e)(1); (2) cause to be prepared an amended determinate term abstract of judgment (form CR-290), box 7 on page one of which is checked, and the monetary orders specified in box 9 on page two of which are deleted and as to which it is stated instead that such orders are set out in box 9 on page two of form CR-292, and which shows a stayed enhancement pursuant to Penal Code section 186.22,

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[10] In addition, the $10 fine imposed pursuant to section 1202.5 is not set out on either abstract.

subdivision (b)(1)(C); (3) cause to be prepared corrected minutes of the sentencing hearing of October 22, 2014, showing, with respect to count 3, a special allegation pursuant to Penal Code section 12022.53, subdivisions (b) and (e)(1) (principal personally used a firearm), and a special allegation pursuant to Penal Code section 186.22, subdivision (b)(1)(C); and (4) transmit certified copies of both amended abstracts of judgment to the appropriate authorities.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.